

2-11-1  
Lunter

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-218427.3 DATE: November 27, 1985  
MATTER OF: Pacific Towboat and Salvage Co.

## DIGEST:

1. Where protester files Freedom of Information Act request promptly after learning of award and there is no showing that agency-level protest then was not filed within 10 days after protester received the information on which its protest was founded, protest was timely filed. Fact that information might have been available from another source more quickly does not render protest untimely.
2. Protest against award to firm that offered tugboats that were not classed at time of initial proposal submission is denied where the only reasonable reading of the RFP's classification requirement was that classed tugs had to be used to perform the work and that tugs thus did not have to be classed until time of delivery.

Pacific Towboat and Salvage Co. (PacTow) protests the award of a contract to Zapata Gulf Marine Corporation (Zapata) under request for proposals (RFP) No. N00033-85-R-2002, issued by the Military Sealift Command, Department of the Navy, for the charter of tugboats to tow Navy vessels in San Diego Harbor. The RFP required that an offeror's tugs "be classed by a recognized classification society"; a society's classification certifies that a vessel has been found to meet structural and mechanical standards for vessel design and construction. Zapata's tugs were not classified until after award, prior to delivery. PacTow contends that since Zapata's offered tugs were not classified at the time of proposal submission, the Navy improperly accepted Zapata's offer. We deny the protest.

As a preliminary matter, the Navy argues that PacTow's protest to our Office is untimely because the company's initial protest to the Navy was not timely filed according to our Bid Protest Regulations, i.e., within 10 working days after PacTow knew or should have known the basis of its protest. See 4 C.F.R. § 21.2(a)(2) (1985). The Navy

033902

states that it orally notified PacTow of the award on June 20, and that this notification included the names of Zapata's tugs. The Navy asserts that it is a relatively easy matter to ascertain by a telephone call to the appropriate classification society the classification and date thereof once the name of a vessel is known. The Navy concludes that PacTow should have determined the classification of Zapata's tugboats shortly after the June 20 notification and that, because it did not do so, its August 7 protest to the Navy and subsequent protest to our Office were untimely. We disagree.

PacTow requested a copy of Zapata's contract in a Freedom of Information Act (FOIA) request on June 26. PacTow states that it actually received information on Zapata's tugboat classifications prior to the Navy's response to its FOIA request, and that it filed its protest with the Navy on August 7, no more than 10 working days later. Given that PacTow diligently pursued its possible protest grounds through a prompt FOIA request, and that the Navy has not shown that PacTow actually knew its basis of protest more than 10 working days prior to the August 7 protest, we consider the protest diligently pursued and timely filed. See Pennsylvania Blue Shield, B-203338, Mar. 23, 1982, 82-1 C.P.D. ¶ 272. The fact that Zapata's tugboat information might have been learned more rapidly from another source does not render the protest untimely.

Turning to the merits of the protest, in PacTow's view, the RFP clearly required classification at the time of proposal submission since the clause stating that tugs "shall" be classed by a recognized classification society was worded in the present tense, and the RFP specifically required offerors to list each tug's present certifications. In the alternative, PacTow contends that the RFP was, at the very least, unclear as to when classification had to be effected, and that it was reasonable for an offeror to interpret the solicitation as requiring classification at the time of proposal submission. PacTow concludes that this ambiguity prevented it (and other offerors) from competing on an equal basis.

The Navy takes the position that it was sufficiently clear from the RFP that the tugs did not have to be classed until the time of delivery. The Navy further points out that, under PacTow's interpretation, offerors with nonclassed tugs would have had to incur the significant

expenses of classification just to be able to submit acceptable proposals.

In our view, the only reasonable interpretation of the provision is that the offeror had to propose to perform with classed tugs. We find no basis for PacTow's position that the provision stating that tugs "shall" be classified and the requirement for a listing of each tug's present certifications and classification in any way established proposal submission as the time for classification. By their plain terms, these provisions did not go the further step of requiring classification at a certain time, and neither provision stated that offers of tugs not presently classed would be rejected. While the clause requiring classification did not expressly state that vessels had to be classified only at the time of delivery, we simply find no basis for assuming that classification was intended at some earlier time. We agree with the Navy that it is unreasonable to suggest that the government would have intended a firm to go through the expense of classification simply to submit an offer for a contract it might not win. See Phoenix Power Systems, B-204038, Nov. 2, 1981, 81-2 C.P.D. ¶ 374.

In any case, we fail to see how PacTow was prejudiced by its reading of the RFP.

PacTow argues that it was prejudiced because it has spent a considerable amount of money preparing and maintaining its offered tugs in a classified status and had to build these higher costs into its offered price. PacTow asserts that, in contrast, the offeror of a nonclassified tug enjoyed a considerable cost advantage because it did not have to include in its price the extra cost of building and continuously maintaining the tug in class. PacTow also asserts that these costs are significantly greater than the one-time cost of having a nonclassified tug classified.

Prejudice would exist in this case were it shown that PacTow would have offered unclassified tugs at a lower price than Zapata, that is, that PacTow would have responded differently to the RFP had it been aware of the intent of the requirement in issue. There is no indication that PacTow could have offered unclassified tugs at all; PacTow nowhere states that it would have offered unclassified tugs, and its protest submissions refer only to its classed

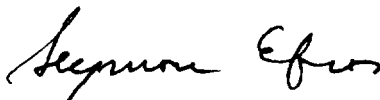
tugs. Thus, PacTow apparently would have had to offer the same classed tugs no matter when classification was required, indicating a lack of prejudice.

Even if PacTow was in a position to offer unclassified tugs, it ultimately would have had to incur the cost of classification prior to delivery. According to PacTow's own agency-level protest, these costs, which presumably would have been reflected in the offered price, would include the costs of bringing the tug up to the applicable standards and, thus, could be substantial, amounting to several times the nominal \$3,000 inspection fee. We find nothing in the record, beyond PacTow's broad assertions, to indicate that its additional costs resulting from the offering of tugs classed as of proposal submission were materially greater than Zapata's additional costs of having its tugs classed after award.

Although PacTow goes to great lengths to explain the cost disadvantage of having built and maintained its tugs in class, we fail to see how any of these long-term costs were related to the solicitation. Even accepting PacTow's interpretation as to the timing of classification, the RFP nowhere required tugs which had been maintained in class for any substantial period of time. The additional cost of maintaining tugs in class from the time of construction and the resultant higher offered price are attributable not to reliance by PacTow on an RFP requirement, but to PacTow's business decision to engage in the chartering of classed tugs.

Finally, we point out that since the solicitation only required that the contract be performed with classed tugs, Zapata's response to the certifications and classifications clause--that its tugs were not classed at proposal submission--did not constitute an exception to the solicitation affecting the firm's obligation if awarded the contract. As stated above, Zapata has met its contract responsibility in that respect.

The protest is denied.

*for*   
Harry R. Van Cleve  
General Counsel